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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re XAVIER C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. XAVIER C., Defendant and Appellant.	D069984, D070538 (Super. Ct. No. J236335)

CONSOLIDATED APPEALS from a judgment and order of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed in part, reversed in part and remanded with directions.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Barry Carlton,

Sabrina Y. Lane-Erwin, and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Xavier C. appeals the juvenile court's judgment declaring him a ward of the court under Welfare and Institutions Code section 602[1] and placing him on probation, and a subsequent order modifying the terms and conditions of probation. On appeal, Xavier asserts the probation condition restricting his use of computers to school-related activities is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and overbroad. Xavier also asserts, and the Attorney General concedes, that the trial court erred by failing to award him predisposition custody credits and not specifying the maximum period of confinement. We reject Xavier's contention that the probation condition was unreasonable and overbroad, but remand for the juvenile court to calculate predisposition custody credits and the maximum period of confinement.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2013, 16-year-old A.K. reported to her school's mental health counselor that she had been sexually assaulted by 17-year-old Xavier the night before. The incident was reported to San Diego Police department, who interviewed A.K. that day. A.K. told the interviewing officer that after she went to bed, Xavier (who was staying at the house) came into the bedroom, laid in the bed facing her, pulled down the covers, then tried to pull her shorts and underwear down. A.K. resisted, but Xavier eventually pulled her clothing down and tried to insert his penis into her vagina. Before he could do so, A.K.

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1 Undesignated statutory references are to the Welfare and Institutions Code.

pushed Xavier off of her and out of the room. A.K. reported that as she shut the door, Xavier said "Let's do it again." After initially refusing, A.K. agreed to submit to a forensic rape test. Xavier was interviewed about the incident in March 2014 and denied A.K.'s allegations. In May, the police received the results of the rape test, which found Xavier's DNA on swabs of A.K.'s genital area and breasts.

On November 19, 2014, the district attorney filed a petition under Welfare and Institutions Code section 602 on behalf of Xavier alleging violations of Penal Code sections 288a, subdivision (c)(2) (oral copulation by force or fear; count 1); 220, subdivision (a) (assault with intent to commit rape; count 2); and 243.4, subdivision (a) (sexual battery; count 3). The matter was continued several times. On October 7, 2015, the parties reported to the juvenile court that they reached an agreement that Xavier would admit the allegation of assault with intent to commit rape and the two other allegations would be dismissed. The court accepted Xavier's plea, sustained the petition and dismissed counts 1 and 3.

On October 14, 2015, San Diego police responded to a report of a robbery downtown. The victim told the responding officers that four men approached him as he walked down the street. One of the men asked the victim for cigarettes and marijuana, and then told the victim to empty his pockets. When the victim ignored the request, one of the men pulled out a handgun. The victim tried to grab the man's arm, but one of the other perpetrators grabbed the victim by the neck and pulled his wallet out of his pants pocket. One of the men took $300 and the victim's identification card from the wallet, while the others took three packs of Camel cigarettes from the victim's backpack. The

men yelled "blood" then fled the scene. The victim gave police a description of the four men.

Shortly thereafter, police found Xavier and three other men, who matched the description given by the victim, at a nearby convenience store. The men were detained and identified by the victim. Police found a black imitation gun in the waistband of one of the men, as well as a pack of Camel cigarettes in his pocket and $79 in cash in his sock. Another had $107 in his sock, and Xavier had $85 in his sock. Police found another pack of Camel cigarettes stuffed between the seats of the police car where Xavier had been detained. When interviewed by the police, Xavier admitted two of his companions had robbed the victim, and that they had used the term "blood" during the robbery. Xavier told police he was scared to leave and that his companions gave him money and cigarettes because they thought he would "snitch." Xavier was taken into custody and booked into juvenile hall.

The next day, the district attorney filed a petition under Welfare and Institutions Code section 602 on behalf of Xavier alleging violations of Penal Code section 211 (robbery; count 1) and Health and Safety Code section 11357, subdivision (a) (possession of concentrated cannabis; count 2). On November 12, 2015, Xavier admitted the allegation in count 1. The juvenile court sustained the petition, dismissed count 2, and set the disposition hearing for both petitions. For the disposition hearing, the probation department recommended that Xavier be committed to the Youthful Offender Unit (YOU) for a period not to exceed 480 days. Xavier contested the recommendation. His

counsel argued that commitment to the YOU program was not in Xavier's best interests, and he should instead be placed in a residential treatment program.

At the disposition hearing, the juvenile court adjudged Xavier a ward under section 602 and committed him to the YOU program. In his social study for the disposition hearing, the probation officer recommended several probation conditions concerning Xavier's use of electronic devices. The recommendations included (1) limiting Xavier's use of electronic devices to "school-related assignments, or legitimate work or personal purposes" as determined by his probation officer and requiring he be supervised while using electronic devices (identified in the probation report as condition 48 and GC302); (2) limiting computer use to school-related assignments (condition 49 and GC341); (3) a waiver of his Fourth Amendment rights with respect to electronic devices (condition 51 and GC353); and (4) precluding Xavier from "knowingly utiliz[ing] the password protect function on any file or electronic device . . . ." (condition 50 and GC352).

During the hearing, Xavier's counsel objected to these conditions on the ground that no electronic device was used in the offenses. In response, the court sustained the objections to conditions 48 and 50, but rejected the objection to condition 49. With respect to condition 49, the court stated that it was imposing the condition because it did not "believe that [Xavier was] going to have access to a computer in the YOU program unless it's related to school activities." The final order issued after the hearing imposed two relevant conditions. Condition 49, which stated: "The minor is not to use a computer for any purpose other than school related assignments. The minor is to be

supervised when using a computer in the common area of his/her residence or in a school setting." The other contained the language of condition 51, with the addition of the requirement that Xavier provide the probation department with any passwords to his computer or electronic devices.[2] Xavier filed a notice of appeal from the judgment on March 15, 2016.

The following month, Xavier brought a petition for modification under section 778 requesting the juvenile court strike the two probation conditions. The prosecution filed a brief opposing the petition, but did not address condition 49. At the beginning of the hearing, the juvenile court indicated its tentative decision was to grant Xavier's petition. The court stated it reviewed the relevant case law and did not "think, at least at this juncture, there's enough evidence in the probation report, the social study to get to the point of being able to make a compelling, rational connection between . . . monitoring his electronic devices and monitoring potential gang-related activity." After argument from the deputy district attorney and Xavier's defense counsel, the court stated "I'm going to grant the motion. . . . I agree with [the prosecution] that I believe Xavier does need intensive supervision. There's no question about it. He does. ¶ Whether that includes—

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2 The condition states in full: "The minor's 4th Amendment waiver extends to any electronic device, such as a computer, electronic notepad, or cell phone, which the minor uses or to which the minor has access. The minor's 4th Amendment waiver also extends to any remote storage or any files or data which the minor knowingly uses or to which the minor has access. The minor agrees to submit to a search of any electronic device, such as a computer, electronic notepad, or cell phone, at any time without a warrant by any law enforcement officer, including a probation officer. MINOR IS TO PROVIDE PROBATION WITH ANY PASSWORDS TO HIS COMPUTER OR ELECTRONIC DEVICES."

and we have enough to support monitoring or to support electronic or a 4th waiver as to his electronic devices. I don't think we can get there with what we have in this particular case."

The court then turned to the conditions as they were numbered in the probation report prepared for the disposition hearing. The court stated it was "going to delete 51. I am going to delete 50. I'm going to delete 48." Before concluding, the court asked if there was anything further. Xavier's attorney noted she also objected to condition 49. The court's clerk then stated some of the conditions identified by the court were not included in the final order issued after the disposition hearing. The court clarified it was looking at "GC 341," condition 49, "which relates to restricted to use—and I agree with that." The prosecutor then stated condition 48 was similar, to which the court responded it was aware and that condition 49 covers condition 48. The final order issued after the hearing vacated only the condition waiving Xavier's Fourth Amendment rights to electronic devices and requiring Xavier to provide passwords to his probation officer, and not condition 49. Xavier filed a second notice of appeal from the order.[3]

DISCUSSION

I

Xavier asserts the condition restricting his use of a computer to school-related activities is invalid because the condition is not related to the crimes he committed,

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[3] This court denied Xavier's earlier unopposed motion to consolidate the two appeals. Because the challenged condition is the same in both appeals, on our own motion we have ordered the cases consolidated for purposes of this opinion.

computer use is not itself a criminal act, and computer use is not reasonably related to his future criminality. Xavier also contends the condition is unconstitutionally overbroad. The Attorney General responds that the condition is reasonably related to Xavier's future criminality because he committed a violent sexual offense and robbery with known gang members, and supervision of Xavier's computer use is appropriate to prevent communication with gang members and viewing of violent pornography. We agree with the Attorney General that the trial court did not abuse its discretion by imposing the condition and that the condition is not unconstitutionally overbroad.[4]

A

Section 730, subdivision (b) " 'authorizes the juvenile court to "impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." A

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4 The Attorney General asserts this court should dismiss Xavier's appeal from the juvenile court's order granting his modification petition because the order is not appealable. Under section 800, however, a delinquent minor may appeal a final, postjudgment order like the one at issue. (See § 800 ["A judgment in a proceeding under Section 601 or 602 may be appealed from, by the minor, in the same manner as any final judgment, and any subsequent order may be appealed from, by the minor, as from an order after judgment."].) The Attorney General also contends the juvenile court did not have jurisdiction to modify the conditions of probation once Xavier filed his notice of appeal. Unlike a criminal judgment, however, "[a]n order directing that a minor be made a ward of the juvenile court is necessarily predicated upon circumstances existing at the time of adjudication, but it does not end there." (*In re Katherine R.* (1970) 6 Cal.App.3d 354, 356.) "Wardship, or jurisdiction over the person of a minor, is a continuing condition or status for the welfare of the child and changed circumstances must be considered in any proceeding concerning the child's status, even though such changed circumstances may develop during the pendency of an appeal." (*Ibid*.) Because of the nature of delinquency proceedings, which are ongoing after judgment, Xavier's first notice of appeal did not deprive the juvenile court of jurisdiction to consider his petition to modify the conditions of probation.

juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile.' " (*In re J.B.* (2015) 242 Cal.App.4th 749, 753-754 (*J.B.*).) "[B]ecause juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed,' " the "permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults." (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*).) "The reasonableness and propriety of the imposed condition is measured not just by the circumstances of the current offense, but by the minor's entire social history." (*J.B.*, at p. 754.)

"The juvenile court's discretion, while broad, is not unlimited. A probation condition is invalid if it: ' "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." ' (*People v. Lent,* [*supra*,] 15 Cal.3d [at p.] 486.) In order to invalidate a condition of probation under the *Lent* test, all three factors must be found to be present. [Citations.] This three-part test applies equally to juvenile probation conditions." (*J.B.*, *supra*, 242 Cal.App.4th at p. 754 quoting (*Lent*, *supra*, 15 Cal.3d at p. 486.).)

"We review the juvenile court's probation conditions for abuse of discretion, and such discretion will not be disturbed in the absence of manifest abuse." (*In re Erica R.* (2015) 240 Cal.App.4th 907, 912.) "While we generally review the court's imposition of

a probation condition for abuse of discretion, we review constitutional challenges to probation conditions de novo." (*In re Malik J.* (2015) 240 Cal.App.4th 896, 901.)

B

The challenged condition, restriction of Xavier's computer use to school-related activities, meets the first two *Lent* factors. It does not have a direct relationship to the crimes Xavier committed, robbery and sexual assault. There is no evidence in the record that Xavier used a computer to facilitate the offenses. Likewise, use of a computer for nonschool-related activities is not itself criminal conduct. The focus of the case, therefore, is whether the condition is reasonably related to preventing Xavier's future criminal activity.

The Attorney General argues that the condition is reasonably related to future criminality because "[c]omputers can easily be used to communicate with fellow gang members, and can be used to view violent pornography." The Attorney General reasons that because the condition minimizes Xavier's access to the internet, it also minimizes any temptation "to contact his gang friends or to otherwise use the computer for illegal purposes." (*Victor L.*, *supra*, 182 Cal.App.4th at p. 926.) Xavier points out that at the hearing on his petition to strike the probation conditions, the court concluded the other probation conditions it struck, which related to electronic devices, were not reasonably related to preventing future criminality. He argues there is no rationale justification to delete these conditions, while leaving the condition that his computer use be restricted to school-related activity.

We disagree. It is clear from the record, that the juvenile court carefully considered each condition independently before concluding only condition 49 should remain in place. Xavier participated in an armed robbery with known gang members. Although the trial court did conclude that little other evidence connected Xavier to the gang, the court explicitly expressed concern about Xavier's gang ties and the need to prevent Xavier from further involvement with gang members. This concern relates directly to preventing Xavier from engaging in future criminal activity. The juvenile court's imposition of a condition that limited Xavier's computer use to school purposes and required that use to be monitored was a reasonable means to address the concern.[5] (See *Victor L.*, *supra,* 182 Cal.App.4th at p. 926 [conditions forbidding the minor from accessing social networking sites and requiring all internet access be supervised appropriate to limit "access to the Internet in ways designed to minimize the temptation [for the minor] to contact his gang friends or to otherwise use the computer for illegal purposes by requiring adult supervision whenever he goes online"].) The imposition of condition 49 did not constitute an abuse of the court's wide discretion to impose " ' "any reasonable condition that is 'fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " ' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

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5 Further, as the trial court pointed out, Xavier will be in the YOU program for much of the time he is subject to the condition and during that time will only have access to a computer for school-related purposes.

C

We also agree with the Attorney General that the condition was sufficiently tailored to Xavier's rehabilitation. "A restriction is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Xavier was involved in an armed robbery with known gang members and perpetrated a violent sexual offense. The probation condition at issue, restricting his use of computers to school-related activities, is related to the state's compelling interest in rehabilitating Xavier by requiring him to focus his computer use on school. Unlike the adult parole condition at issue in *In re Stevens* (2004) 119 Cal.App.4th 1228, 1231, which Xavier cites, this condition is not a complete ban on internet access. Xavier may access the internet if it is related to his school work. Further, the condition applies only to computers, and not to other electronic devices.[6] The condition, therefore, does not infringe on Xavier's First Amendment rights in the expansive way he asserts on appeal.

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6 Xavier also argues that the juvenile court could not rationally decline to impose condition 48, which he asserts was a "much less severe" restriction, while imposing

II

In juvenile delinquency proceedings, the "minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. (Pen. Code, § 2900.5, subd. (a); [citation.].) It is the juvenile court's duty to calculate the number of days earned, and the court may not delegate that duty. (Pen. Code, § 2900.5, subd. (d); [citation.].)" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.) Under Welfare and Institutions Code section 726, the court is also required to specify the maximum period of confinement. That provision states that "[i]f the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (§ 726, subd. (d)(1).)

Here, the juvenile court did not calculate and award predisposition custody credits or specify the maximum period of physical confinement at the disposition hearing. Remand, as the Attorney General concedes, is appropriate to remedy these errors.

DISPOSITION

The judgment is reversed and remanded with directions to calculate and award any predisposition custody credits and to specify the maximum period of physical

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condition 49. Condition 49, however, does not apply to all electronic devices and in this respect is less stringent and more tailored to the state's rehabilitative interest.

confinement. The judgment is otherwise affirmed. The court's April 19, 2016, order on Xavier's petition for modification of probation conditions is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.